



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 856 OF 2012**

**ANTHONY MWANGI KAMAU.....**  
**CLAIMANT**

**VERSUS**

**C.E.O KENYA YOUNG MENS' CHRISTIAN ASSOCIATION.....1<sup>ST</sup>**  
**RESPONDENT**

**THE EXECUTIVE COMMITTEE YOUNG MENS' CHRISTIAN ASSOCIATION.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 6<sup>th</sup> June 2013 seeking various reliefs against the Respondent. The Claimant also filed an amended Memorandum of Claim on 14<sup>th</sup> march 2014. The Claimant averred that the Respondent was his employer from 14<sup>th</sup> June 2010 to 20<sup>th</sup> July 2012 where he was the Deputy National Secretary based at the Respondent's secretariat in Nairobi. He earned Kshs. 114,651 per month and was summarily dismissed on 20<sup>th</sup> July 2012. He averred that the dismissal was on unfounded allegations that he engaged in dishonesty in procurement of books for the Respondent's library projects. He denied that he was given an opportunity to defend himself against the false and unsubstantiated claims. He sought reinstatement and in the alternative, 3 months salary payment in lieu of notice, damages for breach of contract at 12 months salary, gratuity, annual leave for 2 years and costs of the suit.

2. The Respondents filed a joint Statement of Defence on 23<sup>rd</sup> July 2013 and an amended joint Statement of Defence on 23<sup>rd</sup> June 2014. In it, they averred that the Claimant was employed by the Respondent as Deputy National Secretary General and was issued with a contract of service for 3 years and the contract outlined the Claimant's duties, obligations and responsibilities. The Claimant was also issued with a Personnel Handbook setting out the 2<sup>nd</sup> Respondent's Human Resource policy in addition to the detailed job description. The Respondents averred that the Claimant was required at all times to act in the best interest of the 2<sup>nd</sup> Respondent and carry out his duties diligently and with proper care so as to avoid any loss. The Claimant was charged with ensuring efficient administration and coordination of the 2<sup>nd</sup> Respondent's fundraising functions and at the same time control the expenditure of the 2<sup>nd</sup> Respondent. The Respondents averred that the Claimant was charged with construction of a library in the Kibera YMCA School and that in total disregard of his duties he had failed to source the required books from a supplier with the most competitive price but instead had opted to buy the books from a supplier who exaggeratedly inflated the prices occasioning severe financial loss. The Respondents averred that in a meeting held on 23<sup>rd</sup> July 2012 the Claimant was called to elucidate on his conduct before the National

Executive Committee. The Claimant was unavailable to make final submissions before the committee and the committee found no rational basis for the Claimant's conduct recommended his dismissal. The Respondent's averred that the Claimant was only entitled to leave days not taken which were 26 days only. The Respondents thus sought the dismissal of the Claimant's suit with costs.

3. The Claimant testified on 25<sup>th</sup> June 2014. In his testimony the Claimant stated that the allegations of impropriety were baseless and that no investigation was undertaken. He was not sent on interdiction or compulsory leave. He testified that he was sent away without being given an opportunity to defend himself. He asserted that he was restricted and could not pledge the credit of the 2<sup>nd</sup> Respondent or enter into contracts to bind the 2<sup>nd</sup> Respondent. He testified that procurement was a role for the 1<sup>st</sup> Respondent and it was the 1<sup>st</sup> Respondent who approved the LPO, the quotation and authorised payment. He stated that in the amended statement of defence the Respondent had attached what should have been the investigation but that the same was undertaken in 2014, two years after. The Respondents had ignored the input of the finance and audit officers who were critical to the procurement. The Claimant thus sought a permanent mandatory injunction to compel the Respondents to reinstate him to his position plus payment of salary arrears and in the alternative for damages amounting to Kshs. 2,522,322/- comprised of notice, leave pay, compensation and gratuity.

4. In cross-examination he testified that the purpose of his job was to ensure that programmes were executed at reasonable costs. He stated that it was his responsibility to budget for funds. He testified that the 1<sup>st</sup> Respondent dealt with the requisition. He admitted that his contract permitted summary dismissal and that he received payment for the days he had worked. He was terminated on 20<sup>th</sup> July 2012 and the meeting held on 23<sup>rd</sup> July 2012. He testified that he called for the meeting held on 23<sup>rd</sup> July 2012 to explain his innocence.

5. The Respondent called 3 witnesses. The first was the National General Secretary Mr. Jared Musima. He testified that the Claimant was to ensure the expenditure of the 2<sup>nd</sup> Respondent was controlled. He testified that the Claimant brought to him a requisition form which the Claimant had approved and which he was to counter approve. He testified that issue of the books being inflated was brought to his attention by the coordinator of Kibera YMCA who brought a price list which showed that the books were overpriced. He launched investigations and questioned the auditors and officials who received the books. He testified that usually the person in charge initiates the process of procurement by getting quotations and after that obtains requisition. If the sum is above 100,000/- it is taken to the office of the National Secretary. What is meant to influence decision is prices. After preparing requisition the accounts office prepares LPO. He admitted signing the LPO and stated that the requisition and all the background work was done by the Claimant. He testified that the Claimant was summarily dismissed for gross misconduct for overpricing books.

6. In cross-examination by the Claimant, he testified that the Claimant brought the requisition to him to seek his approval. He conceded that the supplier was a prequalified supplier. He admitted that he authorised payment and even signed the cheques. He stated that he trusted and relied on the information given by the Claimant. He indicated that he was aware of Employment Act and that the Claimant was given an opportunity to be heard on 23<sup>rd</sup> July and the dismissal took place on 20<sup>th</sup> July.

7. In re-examination he testified that the requisition comes before the LPO and that he had approved the LPO based on information he had received. He stated that preparing an LPO or requisition does not amount to pledging credit. He testified that according to the contract and the human resource policy the Claimant could be summarily dismissed and that there was provision for summary dismissal under the Employment Act.

8. The second defence witness was Kenneth Odoyo Owade in charge of YMCA programmes Kibera. He testified that there was a project on issue of books in 2012 and was requested by the Claimant to look for quotations. He stated that he did that and availed the quotations in January 2012. He testified that upon acquisition of the books the Claimant called him to affix stamps on the books and these were later placed in the library at Kibera. The donors came to check on the project and were not satisfied by the number of

books acquired. This triggered him to seek further information and he sought to know the supplier. He went with the list to bookshops and found that the prices for the books had been doubled and he did an analysis.

9. In cross-examination by the Claimant he testified that he was not auditing or supervising the work of his senior, the Claimant. He stated that the books were delivered to the national office and the goods were received. He testified that the supplier was a prequalified supplier. He confirmed that he was contacted on 23<sup>rd</sup> July by the 2<sup>nd</sup> Respondent and gave a report to the committee.

10. In re-examination he testified that he did not know the processes in the Claimant's office and that the exercise he undertook was just a simple comparison of prices.

11. The third and final witness was Mildred Kikechi. She testified that she was an administrative assistant at the 2<sup>nd</sup> Respondent. She stated that she knew the Claimant who was her boss. She indicated that she obtained the quotations for the books and passed them to the Claimant.

12. In cross-examination by the Claimant she testified that their working relationship was good and that the Claimant reported to someone else. She obtained the three quotations from 3 prequalified suppliers. She stated that she was called to a meeting and asked to explain her role in the textbooks procurement. She testified that she did not know the procedure in procurement.

13. In re-examination she testified that she was asked to obtain quotations and that she did that and gave them to the Claimant.

14. Parties agreed to file written submissions. The Claimant filed submissions on 24<sup>th</sup> February 2015 and the Respondent filed submissions on 10<sup>th</sup> March 2015. In his submissions, the Claimant submitted that the dismissal did not meet the legal threshold set by the Employment Act. He submitted that the dismissal was not lawful, fair or just. He stated that he had proved his case and relied on the cases of **Ali (alias) Alvin Safari Ngala v Glory Car Hire & Safaris Msa Ltd [2015] eKLR**, **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** and **Faith Muhache Kingi v Sarol Holdings Limited [2014] eKLR**.

15. The Respondents submissions were to the effect that the Claimant was in charge of the procurement of the textbooks since it was a project under his docket. It was submitted that this was the custom and the Claimant had not disowned the custom. The Respondents submitted that dismissal and summary dismissal differ. The former is dismissal with notice and with reasons stated while the other is without notice for gross misconduct or fundamental breach of the contract of service. The Respondents submitted that on the basis of the provisions under Section 44(c) of the Employment Act, the Respondents were justified to summarily dismiss the Claimant. The Respondents submitted that the quotations were given to the Claimant and he processed them and the procurement of the books was fraudulent. The Respondents submitted that they followed the correct procedure in dismissing the Claimant.

16. It was an undisputed fact that the Claimant was an employee of the 2<sup>nd</sup> Respondent and was under the supervision of the 1<sup>st</sup> Respondent. The issue at hand is the dismissal of the Claimant from employment by the Respondents. He asserts that the dismissal was without basis and that he was therefore entitled to reinstatement to employment or in the alternative to notice, gratuity and pay for the leave days not taken. The Respondents on the other hand assert that the Claimant was summarily dismissed for good cause as he had mis-procured some books for the 2<sup>nd</sup> Respondent's Kibera project.

17. The contract of employment as well as the human resource manual of the 2<sup>nd</sup> Respondent made provision for summary dismissal. Under the Employment Act there is also provision for summary dismissal. Section 41 of the Employment Act provides as follows:-

41 (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the

employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

18. The procedural fairness required under this Section is couched in terms that require that the employer give an explanation before the termination. It is not demonstrated that this was done. Whereas a meeting was held on 23<sup>rd</sup> July 2012, the meeting was held after the fact. Had the Respondents held on till 23<sup>rd</sup> July 2012 the action taken would have complied with the provisions of the law. Failure to do so means the employer did not adhere to the law and the mere fact that there is provision for summary dismissal did not warrant the poor execution of the process. In the claim before the Court notice was not given and the contract in place made provision for 3 months notice.

19. In view of the fact the dismissal was unprocedural I would reduce it to normal termination and award the Claimant 3 months notice pay. I would not order reinstatement to his former position as there indications there is restructuring proposed by the 2<sup>nd</sup> Respondent and the position may be abolished in due course. The Claimant is also entitled to 26 days pay in lieu of leave, 4 months compensation for unlawful dismissal. There will be no order as to costs of the suit. The Claimant will also have a certificate of service.

20. In the final analysis I enter judgment for the Claimant against the 2<sup>nd</sup> Respondent for:-

- a. Kshs. 343,953/- as notice
- b. Kshs. 458,604/- as compensation
- c. Kshs. 99,364.20/- as leave pay
- d. Certificate of service.

Orders accordingly.

Dated and delivered at Nairobi this 4<sup>th</sup> day of **May** 2015

**Nzioki wa Makau**

**JUDGE**